



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 161599

[REDACTED], Respondent
[REDACTED]
[REDACTED]

Pursuant to a petition filed November 5, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify Jasmany Escibano from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on December 11, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits between January 2011 and December 2013. (Exhibit 13)

2. On April 5, 2011, the Respondent's husband, JE, had a public safety business which petitioned the [REDACTED] for an occupancy permit; the petition was granted. (Exhibits 16 and 17)
3. On October 31, 2011, JE registered the public safety business with the Wisconsin Department of Financial Institutions, but by October 1, 2013, the business was delinquent with some unknown filings. (Exhibit 14)
4. On November 20, 2011, the Respondent completed an on-line ACCESS renewal. In that renewal, the Respondent reported that JE was working for a staffing service, but did not specify his income. The Respondent reported no other earned income. (Exhibit 7)
5. On December 9, 2011, the Respondent contacted the agency to update the household's earned income. She electronically signed an application summary, indicating that JE was working for [REDACTED], 50 hours bi-weekly at \$9.00 an hour. The Respondent reported no other earned income. (Exhibits 8 and 12)
6. On December 28, 2012, the Respondent completed an on-line ACCESS renewal. In that renewal, she again reported that the JE was working for [REDACTED], working 25 hours per week at \$9.00 per hour. The Respondent reported no other earned income. (Exhibit 9)
7. On May 30, 2013, the Respondent completed an on-line ACCESS six-month report form (SMRF). In that SMRF, the Respondent indicated that JE was employed with [REDACTED] Enterprises and that he worked 25 hours per week at \$9.00 per hour. The Respondent reported no other, current, earned income. (Exhibit 10)
8. On November 5, 2014, the Office of Inspector General sent the Respondent and her husband Administrative Disqualification Hearing Notices, alleging that they committed an intentional program violation by failing to report to the public safety business, between January 2011 and December 2013. (Exhibit 2)

DISCUSSION

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations "shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device)."

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,

2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been shown.

The Merits of OIG's Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by withholding information about her husband's public safety business between January 2011 through December 2013.

The Respondent, through her husband's testimony, does not dispute the fact that her husband attempted to start a public safety business in 2011, nor does she dispute the fact that she did not report the business. However, the Respondent asserts that the business failed and never generated any income.

While the Respondent's claims are dubious, the fact remains that the burden of proof falls on OIG to prove the Respondent engaged in wrong doing. It is not on the Respondent to prove her innocence. OIG has produced no evidence showing that that JE's public safety business generated any income. Without such evidence, there is no basis upon which to conclude the Respondent and her husband had an obligation to report the business.

I have found no provisions and OIG has not cited any provisions in the FoodShare policy manual or in the federal regulations that require an individual to report a business to the county agency when the business generates no income. See *FoodShare Wisconsin Handbook §1.2.6.1 regarding items requiring verification¹ and 7 C.F.R. 273.2(f)*; See also *7 CFR §273.12 Requirements for Change Reporting Households*. Further, 7 CFR §273.9(b) states that only gross income from a self-employment enterprises is counted.

Consequently, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent's husband operated a business that generated income and that the Respondent failed to report that income.

I note for the record that the Respondent's husband has been reluctant to provide documentation about his business endeavors. He even failed to provide a signed, written statement that his business failed, despite a number of requests for verification; although, he did testify, under oath, that the business never generated income.

It might behoove OIG to work with its legal counsel to secure a warrant or subpoena for the Respondent's tax records from the Wisconsin Department of Revenue and to obtain documentation from the Department of Workforce Development, regarding any unemployment insurance or worker's compensation insurance the business might have been obligated to pay. If OIG finds evidence that JE's business did, in fact, generate income, or that JE earned income from the business, the Respondent could be referred to the district attorney's office for criminal prosecution for public assistance fraud and her husband could also be referred for perjury charges.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an intentional program violation.

¹The state agency is obligated to verify certain items before certifying a household for foodstamps. If the agency asked the Respondent to verify income and he refused to do so, the proscribed remedy is case closure, not the imposition of an IPV sanction. See 7 C.F.R. 273.2(d)(1)

NOW, THEREFORE, it is

ORDERED

That IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

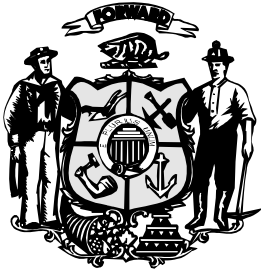
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 19th day of December, 2014.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Keegan Trentzsch - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on December 19, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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